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July 21, 2011

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Attn: Julia Gagne, Hearing Clerk

Dear Chairman Leahy:

Thank you for the opportunity to testify before the Committee concerning the Supreme Court's recent decisions in cases addressing claims involving businesses. I am enclosing my answers to the written follow-up questions from Committee Members that were transmitted to me on July 7, 2011.

I hope that my answers are of assistance to the Committee. If I can provide any further information that would be useful, I would be happy to do so.

Sincerely,

Andrew J. Pincus

**ANSWERS TO QUESTIONS FOR THE RECORD
FROM SENATOR CHARLES GRASSLEY
TO
ANDREW J. PINCUS
FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:
"BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR"
HELD ON JUNE 29, 2011**

1. Please provide any additional thoughts that you might have on the issues raised by the hearing, including but not limited to expanding on your testimony, responding to the testimony of the other witnesses and/or responding to anything said by any Senator.

Although I did not testify before the Committee on behalf of AT&T (or any of my firm's other clients), I do represent AT&T in the *AT&T Mobility LLC v. Concepcion* matter. Senator Franken asked several questions relating to the case, and I want to be sure that the record includes the relevant facts.

The underlying issue in *Concepcion* is whether AT&T properly informed the Concepcions that it would charge California sales tax on the full value of their phones (as required under California law), even though the Concepcions obtained the phones at free or heavily discounted prices. In the hearing, Senator Franken indicated that the Concepcions were not aware of this charge until it later appeared on their bill. <u>But the Complaint filed by the Concepcions to initiate their lawsuit acknowledges that they received and signed an in-store sales receipt displaying the tax charge that subsequently became the basis for their suit.</u>[1] That fact, of course, substantially undermines the Concepcions' claim that they were misinformed about the facts *before* they entered into their transaction with AT&T.

Indeed, court rulings in other cases involving similar claims confirm the lack of merit of the Concepcions' lawsuit. As noted above, the sales tax at issue is <u>required</u> by California law,[2] and at least eight California state judges have held that lawsuits based on claims virtually identical to the Concepcions' lack merit (although one of the decisions is being reviewed by the California Supreme Court).[3] That is another reason why an objective and fair analysis of the Concepcions' claims shows them to be quite weak on the merits.

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[1] First Am. Compl. ¶ 8, Concepcion v. Cingular Wireless LLC, No. 3:06-cv-675-DMS-NLS (S.D. Cal. May 2, 2006).

[2] Cal. Code Regs. tit. 18, §§ 1585(a)(4), (b)(3).

[3] In *Yabsley v. Cingular Wireless, LLC*, 98 Cal. Rptr. 3d 657 (Ct. App. 2d Dist, Div. 3 2009), review granted, No. S176146 (Cal. Nov. 19, 2009), the Court of Appeal held that a class action on which the Concepcions' lawsuit was based had been properly dismissed because, among other things, California law bars lawsuits against retailers based on sales tax when the sales receipt "stated the amount of the sales tax imposed on the sale." *Id.* at 669. As noted above, the Concepcions have conceded that the sales tax was disclosed on their receipt. In *Bower v. AT&T Mobility, LLC*, No. B223364, 2011 WL 2557252 (Cal. Ct. App. 2d Dist., Div. 1 June 29, 2011), the California Court of Appeal held that California law permits ATTM to require consumers to pay these sales taxes.

I would also like to expand upon my comments regarding AT&T's likely response in the event the Concepcions had chosen to invoke the arbitration process, notwithstanding the weakness of their claim on the merits. AT&T will rarely refuse to settle, even if it believes the customer's claim has little merit, because the company risks paying a self-imposed $10,000 penalty (plus double attorneys' fees) if its assessment of the merits of the claim turns out to be wrong. Indeed, as I explained at the hearing, that tremendous incentive to settle claims generously and expeditiously is entirely by design, and is one reason the District Court concluded that the Concepcions are "better off under their arbitration agreement with AT&T than they would have been as participants in a class action."[4] That is why it is very likely that the Concepcions would have received a settlement payment if they had initiated the arbitration process even though the company viewed their claim as unjustified on the merits.

2. The accusations that the Roberts Court is pro-business and anti-little guy are constantly repeated.

Do these accusations against the Supreme Court pose a larger or systemic danger to our legal system and how it is perceived?

Depicting the Supreme Court as "pro-business" or "against workers and consumers" is, I believe, not only entirely inconsistent with the facts but also quite damaging to the Court as an institution. I explained in detail in my written testimony the reasons why this Term's decisions cannot reasonably be characterized in this manner—in fact, parties seeking damages from businesses won as many cases as they lost. Justice Breyer also rejected that charge in an interview at the beginning of the Court Term just ended:

> "Justice Stephen Breyer rejected the notion that the U.S. Supreme Court has a pro-business slant and said the court doesn't rule in favor of companies any more frequently than it has historically. 'I looked back,' he said in a Bloomberg Television interview in which he discussed his new book. 'I couldn't find a tremendous difference in the percentage of cases. They've always done pretty well.'"[5]

More fundamentally, labeling the Court, or particular Justices, as "pro-business" in civil cases or "pro-prosecution" or "pro-defendant" in criminal cases creates the impression that the Court's decisions are based on policy choices or

[4] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).
[5] Greg Stohr, *Breyer Says Supreme Court Doesn't Have Pro-Business Slant* (Bloomberg, Oct. 7, 2010), *available at* http://www.bloomberg.com/news/2010-10-07/breyer-rejects-the-notion-that-u-s-supreme-court-has-a-pro-business-bias.html.

prejudgments, not on the legal principles that govern interpretation of federal statutes or of the Constitution. Transforming the public's perception of the Court—from neutral decisionmaker into yet another political institution—could well undermine the Court's legitimacy over the long-term. If that occurs, it could reduce the willingness of the American people to accept intervention by the Court to protect critical Constitutional rights—free speech, equal protection, due process—in the difficult cases, when those decisions are politically unpopular but essential to the preservation of our Nation's fundamental values.

Answers to Questions for the Record
Hearing on — "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"
June 29, 2011
Submitted by Senator Amy Klobuchar

Question for Andrew Pincus

- Given the *AT&T* decision, do you think corporations will change their behavior when drafting arbitration agreements? If so, how?

  As I explained in my written testimony, it will take years to determine the impact of the Court's decisions, and for that reason I believe we must be cautious in our predictions. However, I do think that *Concepcion* is the most recent manifestation of the federal courts' consistent, ongoing efforts to ensure that arbitration agreements are fair to consumers and employees. Courts have not hesitated to strike down arbitration agreements that unfairly impair a consumer or employee's ability to vindicate his or her claim in arbitration by, for example, precluding awards of punitive damages or attorneys' fees, or requiring the consumer or employee to pay high filing fees or other charges, or mandating that the arbitration occur in a place inconvenient for the employee or consumer. Indeed, there are hundreds of decisions invalidating arbitration agreements on these or similar grounds.

  Concepcion's emphasis on the fairness of the AT&T agreement fits squarely within this trend. Businesses reviewing the decision will notice that the Court specifically pointed to the uniquely beneficial aspects of AT&T's agreement, reiterating the Ninth Circuit's finding that aggrieved customers who filed claims under the agreement "would be 'essentially guarantee[d]' to be made whole."[6] Prudent businesses will react to that passage by reviewing the fairness of their arbitration agreements to see if they can match that high standard. Many businesses that participate in consumer arbitration are likely to adopt the AT&T model—or something similar—that goes above and beyond basic fairness standards to provide affirmative incentives for consumers to seek redress in arbitration.

[6] *Concepcion*, 131 S. Ct. at 1753.

Answers to Questions from Senator Kohl
"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior" 06/29/11
[For Andrew J. Pincus, Melissa Hart, James D. Cox, and Robert Alt]

My colleagues and I worked for many years on reform of the class action system, culminating in the passage of the Class Action Fairness Act in 2005. That law was a balanced approach to address the worst abuses in the class action system. It enabled individuals to collectively and efficiently seek redress for harm and ensuring them fair compensation when their claims had merit, while protecting businesses from being hauled into courts on frivolous claims and where the rules are stacked against them.

But the Supreme Court seems to have turned this careful balance on its head in its recent decision in *AT&T Mobility v. Concepcion*. Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?

> Not at all. As I stated in my testimony, it will take several years for the lower courts to render sufficient decisions for us to determine the impact of the *Concepcion* ruling. But the initial claims that the *Concepcion* decision would "end class actions" is already being rejected, even by plaintiffs' advocates.
>
> First, *Concepcion* is not relevant to entire categories of cases. Most class actions do not arise in the context of a contractual relationship; in the absence of a contractual relationship, there cannot be a preexisting arbitration agreement and *Concepcion* therefore cannot apply. For example, securities class actions and environmental class actions fall into this category.
>
> Second, I believe it unlikely that *Concepcion* will be interpreted to preclude courts from invalidating *any* arbitration agreement containing a class waiver. Arbitration agreements and class waivers can vary greatly in form, and the AT&T provision before the Court in *Concepcion* is considered an exceptionally consumer-friendly arbitration agreement. Nothing in the ruling disturbs the Court's prior cases holding that States may refuse to enforce arbitration provisions that run afoul of a state law principle that unconscionable contract provisions are invalid (so long as that principle is applied generally to a broad range of contract provisions).
>
> Finally, as I discuss in detail in my written testimony (at pages 18-20), lawyers opposed to arbitration are advancing a number of additional arguments that they contend limit the impact of the Court's ruling. Indeed, two of these lawyers, Public Justice attorneys Paul Bland and Arthur Bryant—both strong critics of arbitration—concur with my assessment that reports of the death of class actions have been greatly exaggerated.

As Supreme Court advocate Tom Goldstein said, "It's almost malpractice for a lawyer of a company now not to put an arbitration clause in any kind of document, whether it's a consumer contract or an employment agreement. All of those agreements will be enforced and the company [will] no longer face the prospect [of class action liability], if they write the agreement correctly." Is this the end of class actions?

I believe this analysis greatly overstates the likely impact of the *Concepcion* decision.

As I explained in my written testimony, more than 20 states had already recognized the enforceability of the AT&T arbitration provision, while most others had not yet addressed the question. In refusing to enforce the clause, California was a clear outlier. With that background, it becomes clear that *Concepcion* did not work any radical change in the law. Because the *Concepcion* rule was essentially already in place in many states, most businesses had essentially the same options with regard to arbitration, litigation, and class actions before the decision as they do now.

When determining whether to enter into arbitration agreements with their customers or employees, individual businesses must weigh a variety of factors in light of their unique circumstances. For most businesses, I expect that *Concepcion* will serve as only one of many factors influencing their decisions.

How is an individual consumer with a $30 complaint, like the plaintiff in *Concepcion*, going to find justice, let alone a lawyer to represent him?

The "premium award" features of AT&T's arbitration clause provide very strong incentives to the company to settle meritorious claims. And AT&T's arbitration program makes it very easy for consumers to pursue their claims. A customer can notify AT&T of his or her dispute by making use of a simple, one-page form available on AT&T's web site, and can use a similar, two-page form to initiate the arbitration process. A consumer need not show up to a hearing in person to arbitrate his or her claim; instead, the customer may proceed by telephone or mail if he or she prefers. For most consumer claims, an AT&T customer pays no fees to arbitrate. In addition, it has long been recognized that arbitration's procedures are far simpler and less complicated than court. Thus, a consumer may not even need a lawyer to obtain a fair resolution. He or she will not need to navigate our complex litigation procedures to gain relief, and the company has a strong incentive to fairly resolve the claim.

That does not mean that consumers who wish to have an attorney pursue their claim will not be able to obtain one. Nothing prevents an enterprising lawyer from advertising for clients and then using the incentives created by the AT&T clause to obtain settlements that are close to—if not in excess of—the value of each client's claim.

These characteristics of the AT&T agreement are the reasons why the Supreme Court rejected the argument that its ruling would preclude vindication of small claims:

> "Moreover, the ***claim here was most unlikely to go unresolved***. . . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration

award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and ***the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole***. Indeed, the District Court concluded that the Concepcions were ***better off*** under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"[7]

Moreover, it is important to remember that the vast majority of small consumer disputes are individualized—for example, an overcharge on a bill, or a faulty piece of merchandise. Class actions provide no help for these individualized disputes. And if left with a court solution as their only option, these consumers will be far worse off. They will be unable to obtain a lawyer to pursue litigation over a modest sum, yet unable to navigate our complex litigation procedures on their own. Even in small claims court, a consumer would typically have to take time from work to resolve the dispute. That tradeoff that is unlikely to leave the consumer better off.

With arbitration, consumers are provided a simplified, user-friendly means to resolve such disputes. Often, they have the option of choosing a telephone hearing or a decision on the papers alone. Arbitration allows these consumers to resolve their dispute without interruption to their workday, and oftentimes without even need of a lawyer.

If arbitration were eliminated in favor of class actions, the effect would be to leave most individuals—indeed, the vast majority of consumers—out in the cold.

In light of *Concepcion*, what can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?

In my view, there is no basis for Congressional action at this time, because there is no imbalance to redress. Simply put, there is no evidence at all that the Court's rulings will preclude injured individuals from vindicating their rights. Indeed, the instantaneous knee-jerk media reactions to the Court's decisions—dramatically declaring "the end of class actions"—have been replaced by more sober assessments, especially as the lower courts do their work to interpret and apply these decisions. For instance, *The New York Times* recently reported that as the lower courts issue their first post-*Dukes* rulings, it appears that the decision "has ***not*** spelled doom for employment lawsuits facing other big U.S. companies." In fact, some such lawsuits "have even been strengthened by the ruling."[8]

[7] *Concepcion*, 131 S. Ct. at 1753.

[8] *Analysis: Wal-Mart Ruling No Knock-Out Blow for Class Actions*, N.Y. Times, July 12, 2011 (emphasis added).

If, in the future, Congress does take up the question whether to reform class actions, however, it should consider the practicalities of how litigation impacts real people. Too often, the debate considers only an idealized version of class actions.

For example, Susan Beck (a Senior Writer for The American Lawyer) recently wrote that while "it's easy to see why workers' advocates were upset with" the *Dukes* ruling, "it's not as if the class actions landscape before *Dukes* was some plaintiffs' paradise."[9] Beck reminded readers that Betty Dukes' litigation has been ongoing for a decade, and yet has not come close to reaching the merits of her claim—and unfortunately Dukes' case is not simply an outlier. Beck concludes:

> It's not right to make people wait six or seven or ten years to have their employment claims decided. In light of all this, a simple arbitration that doesn't require much lawyering starts to look better. Class actions may scare corporations, and may provide big fees for plaintiffs lawyers, but they're often not a sensible solution for individual workers. And their interests often get lost in this debate.

I concur with Beck's conclusion. Both plaintiff and defense lawyers earn huge fees from class action lawsuits. But Congress' first and foremost consideration should be the real-world experiences of the individuals involved in these suits. Judged against that standard, I believe the Court's ruling in *Concepcion* will prove helpful to consumers and employees who will be afforded a realistic means of dispute resolution rather than left either to fend for themselves in court or to receive little if any benefit whatsoever from class actions.

Another important consideration must be the abuse of the class action process, something that has continued notwithstanding Congressional reform efforts. Class actions too frequently provide little or no benefit to consumers. Class members often receive exactly nothing from settlements and awards—because they do not know about them, fill out complicated claims forms incorrectly, or fail to fill out the forms at all.[10] Yet lawyers continue to walk away with outrageous fees.[11] If fees paid to defense lawyers are

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[9] Susan Beck, *Class Actions Before* Dukes *Weren't Always So Great For Workers*, The AmLaw Litigation Daily, July 06, 2011.

[10] *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 103 (2003) ("in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms").

[11] For example, in a case currently pending in the Southern District of New York, attorneys are seeking $13 million in fees for their work in an antitrust class action—even though the class received nothing other than a promise by the defendant not to raise prices for five months. *See* Ted Frank, *CCAF objection in Blessing v. Sirius XM Radio*, PointofLaw.com (July 19, 2011). That example is not at all unique. *See* Daniel Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com On the Docket (June 23, 2010), *available at* http://blogs.forbes.com/docket/2010/06/23/st-louis-judge-hands-lawyers-21-million-forcoupons; Daniel Fisher, *Lawyer Appeals Judge's Award of $21 Million in Fees, $8 Coupons for Clients*, Forbes.com (Jan. 10, 2011), *available at* http://blogs.forbes.com/danielfisher/2011/01/10/lawyer-appeals-judges-award-of-21-million-in-fees-8-coupons-for-clients ("The judge didn't even see fit to inquire into the lawyers' valuation of the coupon portion of the settlement, despite strong evidence that less than 10% of coupons in such cases are ever redeemed"). One study

factored in as well—as they must be—the transaction costs of this dispute resolution system far outweigh the benefits provided to plaintiffs. It is the actual real-world impact of class actions on all parties, not the way class actions could operate in a theoretical transaction-cost free world, that should be the basis for any reform effort.

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found that lawyers representing consumer classes received an *average* of $1,270 per hour. *See* Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION RPTS. 167, 196 (2003).